

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

2005 JAN 31 PM 2:13

KODIAK PRODUCTS CO., INC.,

Plaintiff,

v.

TIE DOWN, INC.,

Defendant.

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Civil Action No. 4:03-CV-1474-Y

**EMERGENCY MOTION, AND BRIEF IN SUPPORT THEREOF, TO QUASH  
DEPOSITION NOTICES AND FOR PROTECTIVE ORDER  
RELATING TO SAME**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Plaintiff, Kodiak Products Co., Inc. ("Kodiak"), pursuant to Federal Rule of Civil Procedure 26(c), requests this Court quash the deposition notices of William Glidewell and Jerry Dolezal and enter a protective order relating to same.

**BACKGROUND**

Kodiak filed this action on December 23, 2003. On April 22, 2004, the Court issued its Initial Scheduling Order, which provided the parties cease all discovery activity on October 15, 2004. On two separate occasions, July 14, 2004 and September 21, 2004, the parties submitted agreed motions that included requests to extend this deadline. The Court granted both motions. The deadline imposed by the final order modifying the scheduling order required the parties to cease all discovery activity on January 30, 2005.

On December 28, 2004, Tie Down, Inc. ("Tie Down") served a Notice of Taking Deposition of William Glidewell for January 17, 2005. A copy of this notice is attached as Exhibit "1" to the Affidavit of Bryon L. Romine ("Romine Aff."), which is attached as Exhibit

“A” to this Motion. Counsel for Tie Down agreed to withdraw the notice as it appeared at that time settlement negotiations might bear fruit. (Romine Aff. ¶ 2.)

During the week of January 17, 2005, when settlement negotiations stalled, counsel for Tie Down sought dates, specifically January 27, 2005, for the depositions of both Glidewell, and *for the first time*, Dolezal, an employee of Kodiak. (Romine Aff. ¶ 3.)

On Friday January 21, 2005, Kodiak offered to enter a stipulation dismissing this case with prejudice. A copy of the correspondence enclosing the proposed stipulation is attached as Exhibit “2” to the Romine Affidavit. Tie Down refused to enter the stipulation as proposed, but conditioned its agreement to dismiss the case on extending the discovery period three months in order to seek evidence to support a claim for attorneys’ fees. A copy of Tie Down’s proposed stipulation is attached as Exhibit “3” to the Romine Aff. In response to this unreasonable condition, counsel for Kodiak informed counsel for Tie Down it intended to simply file a Motion to Dismiss, without Tie Down’s stipulation.<sup>1</sup> (Romine Aff. ¶ 4.)

In spite of this, Tie Down continued to seek additional depositions. In order to avoid engaging in discovery battles relating to satellite litigation (which, despite its best efforts, it has not), Kodiak’s counsel engaged in informal discussions concerning Glidewell’s deposition. In addition to dates, counsel for the parties discussed the length and scope of the deposition. However, Kodiak never agreed to produce Dolezal for deposition after the close of discovery. (Romine Aff. ¶ 5.)

On January 27, 2005, Tie Down served notices of deposition for both Glidewell and Dolezal for February 9, 2005. A copy of the notices and correspondence from Tie Down’s counsel concerning the notices is attached as Exhibit “4” to the Romine Aff. Counsel for Kodiak immediately sent correspondence to counsel for Tie Down seeking its withdrawal of the Dolezal

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<sup>1</sup> Kodiak’s Motion to Dismiss with Prejudice has been filed contemporaneously with this Motion.

notice. The letter also sought a written stipulation concerning the length and scope of the Glidewell deposition as conditions to producing him after the close of discovery. A copy of this correspondence is attached as Exhibit “5” to the Romine Aff.

By a letter dated January 31, 2005, Counsel for Tie Down refused to enter the written stipulation. A copy is attached as Exhibit “6” to the Romine Aff.

Kodiak agrees with many of the statements in the letter, but not all. Kodiak agrees that many of the discussions concerning Glidewell’s deposition arose in the context of settlement discussions -- if the case did not settle, but rather appeared to be going to trial, depositions would be allowed. However, a disagreement between the parties exists concerning the content of discussions concerning Glidewell’s deposition after Kodiak announced its intention to dismiss the case -- namely the limits on the deposition. (Romine Aff. ¶ 8.)

Despite Tie Down’s assertion to the contrary, counsel for the parties discussed the limits in the proposed Rule 29 stipulation. Counsel for Tie Down was specifically asked how much time would be required to take Glidewell’s deposition. Counsel responded he could take the deposition in a half a day. Counsel was also asked, given that Kodiak intended to seek the dismissal of the case, why he needed the deposition. Counsel responded that, given his interpretation of the case law governing attorneys’ fee awards under the Lanham Act, he desired testimony concerning the merits of the case. (Romine Aff. ¶ 9.) The proposed Rule 29 stipulation sought to memorialize these discussions and hold counsel to his representations.

### **ARGUMENTS AND AUTHORITIES**

The Court should quash the Glidewell and Dolezal deposition notices and enter a protective order relating to same because: 1) Tie Down seeks these depositions after the close of the discovery period; 2) Tie Down has already far exceeded the number of depositions

authorized by the Federal Rules of Civil Procedure; and 3) given Kodiak has filed it's a motion to dismiss the case with prejudice, Tie Down seeks the depositions solely as a tool of harassment and annoyance.

Tie Down seeks to depose Glidewell and Dolezal on February 9, 2005, in spite of the Court's entry of an *agreed* order that provided all discovery cease January 30, 2005. Moreover, Tie Down has already taken 16 depositions in this case.<sup>2</sup> Federal Rule of Civil Procedure 30(2)(A) requires a court order to take more than 10.

Kodiak engaged in preliminarily discussions concerning the Glidewell deposition, even after it announced its intent to seek a dismissal of the case. But the parties never reached a final agreement -- counsel for Tie Down has refused to sign a written stipulation pursuant to Federal Rule of Civil Procedure 29. Moreover, Kodiak never agreed, orally or in writing, to the deposition of Dolezal outside the discovery period. The purpose of Rule 29 is to avoid disputes concerning informal oral agreements and "understandings", and wasting judicial resources in resolving such disputes. *See Tropix, Inc. v. Lyon & Lyon*, 169 F.R.D. 3, 3-4 (D. Mass. 1996); *Byrd v. Byrd*, 1998 U.S. Dist. LEXIS 11855 \*8-9 (D.D.C. February 12, 1998). Thus, under Rule 29, oral agreements relating to discovery are not enforceable. *See Pertrucelli v. Bohringer & Ratzinger, GMBH*, 46 F.3d 1298, 1310 (3<sup>rd</sup> Cir. 1995).

In addition, Tie Down seeks these depositions in spite of Kodiak's clear expression of its intent to seek dismissal of the case. The only conceivable basis for these depositions now is to annoy and harass Kodiak. This is especially true in the case of Glidewell, given Tie Down has already cross-examined him in open court at the preliminary injunction hearing held September 9, 2004. Any testimony concerning the "merits of the case" Tie Down feels is required to

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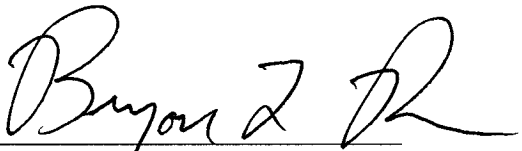
<sup>2</sup> Tie Down submitted transcripts of these depositions in support of its opposition to Kodiaks requested preliminary injunction.

support its claim for attorney fees' was, or could have been, obtained in this cross-examination. The Court is authorized to protect parties from the harassment and annoyance, as well and the undue burden and expense, the depositions will involve. *See* FED. R. CIV. PRO. 26(c).

**RELIEF REQUESTED**

Because Tie Down seeks the depositions of Glidewell and Dolezal outside the discovery period and no written stipulation exists authorizing such depositions, Kodiak seeks an Order from the Court quashing the deposition notices and entry of a protective order relating to same. Moreover, because the depositions have been noticed for February 9, 2005, Kodiak requests this Motion be granted ex parte or, in the alternative, that Tie Down be ordered to file a response by such time that will allow the Court to determine the Motion prior to February 9, 2005.

Respectfully submitted,

By: 

GARY S. KESSLER  
Texas Bar No. 11358200  
BRYON L. ROMINE  
Texas Bar No. 24029804

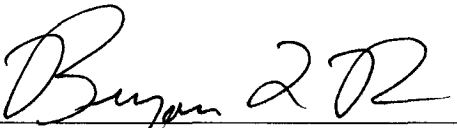
KESSLER & COLLINS  
A Professional Corporation  
5950 Sherry Lane  
Suite 222  
Dallas, Texas 75225  
214.379.0722  
214.373.4714 (Facsimile)

***ATTORNEYS FOR KODIAK PRODUCTS  
CO., INC.***

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of *Plaintiff's Emergency Motion, and Brief in Support Thereof, to Quash Deposition Notices and Protective Order Relating to Same* was served via facsimile on the 31<sup>st</sup> day of January, 2005, on the following counsel of record:

J. Alexander Porter  
Porter & Orrison, LLP  
3400 Peachtree Rd. N.E.  
1135 Lenox Towers  
Atlanta, Georgia 30326

  
BRYON L. ROMINE

**CERTIFICATE OF CONFERENCE**

I certify that this Emergency Motion to Quash and for Protective Order is opposed. Counsel for Kodiak Products Co., Inc and counsel for Tie Down, Inc., J. Alexander Porter, exchanged correspondence dated January 27, 2005 and January 31, 2005 in an attempt to resolve the issues underlying this Motion, but were unable to reach an agreement. Kodiak maintains it never agreed to allow Tie Down to take the deposition of Jerry Dolezal after the close of the discovery period and after it filed a Motion to Dismiss. The parties disagree on the terms of an informal, oral agreement concerning the deposition of William Glidewell.

  
BRYON L. ROMINE

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

KODIAK PRODUCTS, INC.,

Plaintiff,

v.

TIE DOWN, INC.,

Defendant.

§  
§  
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§  
§

Civil Action No. 4:03-CV-1474-Y

**AFFIDAVIT OF BRYON L. ROMINE**

1. My name is Bryon L. Romine. I am over the age of 21 years. I am counsel for Kodiak Products, Inc. and have personal knowledge of the facts stated in this Affidavit and the facts stated in this Affidavit are all true and correct.

2. Attached as Exhibit "1" to this Affidavit is a true and correct copy of a Notice of Taking Deposition of William Glidewell served by Tie Down on December 28, 2004. In discussions I had with its counsel, Tie Down agreed to withdraw the notice as it appeared at that time settlement negotiations might bear fruit.

3. During the week of January 17, 2005, when it appears settlement negotiations were going nowhere, counsel for Tie Down sought dates, specifically January 27, 2005, for the depositions of both Glidewell, and *for the first time*, Dolezal, an employee of Kodiak.

4. On Friday January 21, 2005, Kodiak offered to enter a stipulation dismissing this case with prejudice. A true and correct copy of the correspondence enclosing the proposed stipulation is attached as Exhibit "2" to this Affidavit. Tie Down refused to enter the stipulation as proposed, but instead conditioned its agreement to dismiss the case on extending the discovery period three months in order to seek evidence to support a claim for attorneys' fees. A copy of Tie Down's proposed stipulation is attached as Exhibit "3" to this Affidavit. In response to this unreasonable condition, counsel for Kodiak informed counsel for Tie Down it intended to simply file a Motion to Dismiss, without Tie Down's stipulation.

5. In spite of this, Tie Down continued to seek additional depositions. In order to avoid engaging in discovery battles relating to satellite litigation (which, despite its best efforts, it has not), Kodiak's counsel, including myself, engaged in informal discussions concerning Glidewell's deposition. In addition to dates, counsel for the parties discussed the length and scope of the deposition. Kodiak, however, never agreed to produce Dolezal after the close of discovery.

6. On January 27, 2005, Tie Down served notices of deposition for both Glidewell and Dolezal for February 9, 2005. A true and correct copy of the notices and correspondence from Tie Down's counsel concerning the notices is attached as Exhibit "4" to this Affidavit. I

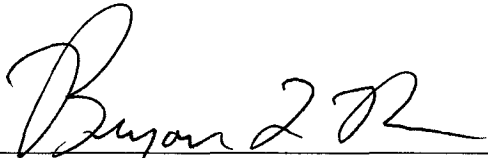
immediately sent correspondence to counsel for Tie Down seeking Tie Down's withdrawal of the Dolezal notice. The letter also sought a written stipulation concerning the length and scope of the Glidewell deposition as conditions to producing him after the close of the discovery period. A true and correct copy of this correspondence is attached as Exhibit "5" to this Affidavit.

7. Attached as Exhibit "6" to this Affidavit is a true and correct copy of correspondence received from counsel for Tie Down refusing to enter the stipulation.

8. Kodiak agrees with statements in Exhibit 6, including that many of the discussions concerning Glidewell's deposition arose in the context of settlement discussions -- if the case did not settle, but rather appeared to be going to trial, depositions would be allowed. However, Kodiak disagrees with the content letter relating to discussions concerning Glidewell's deposition after Kodiak announced its intention to dismiss the case -- namely the limits on the deposition.

9. After Tie Down continued its pursuit of depositions after Kodiak indicated its intent to seek a dismissal of the case, counsel for Tie Down was specifically asked how much time would be required to take Glidewell's deposition. Counsel was also asked why he needed the deposition. Counsel responded that, given his interpretation of the case law governing attorneys' fee awards under the Lanham Act, he desired testimony concerning the merits of the case.

EXECUTED this 31<sup>st</sup> day of January 2005, in Dallas County, Texas.

  
\_\_\_\_\_  
BRYON L. ROMINE

SWORN TO AND SUBSCRIBED BEFORE ME, this \_\_\_\_ day of January, 2005.

[SEAL]

\_\_\_\_\_  
Notary Public, State of Texas

Print: \_\_\_\_\_



IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

KODIAK PRODUCTS CO., INC., )

Plaintiff, )

v. )

TIE DOWN, INC., )

Defendant. )

Civil Action No. 4:03-CV-1474-Y

**NOTICE OF TAKING OF DEPOSITION**

To: Plaintiff Kodiak Products Co., Inc. by and through its counsel of record Bryon L. Romine, Kessler & Collins, 5950 Sherry Lane, Suite 222, Dallas Texas 75225

Please take notice that the Defendant Tie Down, Inc. in the above-styled action will take the deposition of William Glidewell , managing agent of Plaintiff, commencing at 9:30 am o'clock Central Time, on January 18, 2004, at the offices of FORD WHITE & NASSEN P.C. 8080 North Central Expressway Suite 1600, LB 65, Dallas, Texas 75206-1819

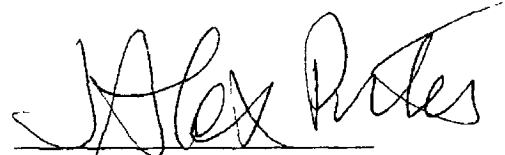
This deposition will be taken before an officer duly authorized to administer oaths, and shall continue from day to day until completion. Said deposition will be taken on oral examination pursuant to the Federal Rules of Civil Procedure and for all purposes of cross examination of an adverse party and for all other purposes authorized by those Rules and any other applicable rules. You are invited to attend.

EXHIBIT 1

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the above and foregoing documents has been served on the following counsel of record on this the 28<sup>th</sup> day of December, 2004:

Gary S. Kessler, Esq.  
Bryon L. Romine  
Kessler & Collins  
5950 Sherry Lane, Suite 222  
Dallas, Texas 75225  
Facsimile: (214)373-4714

  
J. Alexander Porter

PORTER & ORRISON, LLP  
Lenox Towers Suite 1135  
3400 Peachtree Road, N.E.  
Atlanta, Georgia 30326  
Telephone: (404)233-2334  
Facsimile: (404)231-5318



January 21, 2005

***THIS CORRESPONDENCE CONSTITUTES A SETTLEMENT COMMUNICATION  
UNDER FEDERAL RULE OF EVIDENCE 408.***

**VIA EMAIL - [aporter@porterorrison.com](mailto:aporter@porterorrison.com)**

Mr. J. Alexander Porter  
PORTER & ORRISON, LLP  
3400 Peachtree Road, N.E.  
1135 Lenox Towers  
Atlanta, Georgia 30326

Re: *Kodiak Products Co., Inc. v. Tie Down, Inc.*; Civil Action No. 4-03CV1474-Y; Filed in  
the U.S. District Court, Northern District of Texas, Fort Worth Division

Dear Alex:

I have enclosed with this letter a proposed Stipulation of Dismissal and Order relating to same. Because Kodiak no longer wishes to pursue its claims, I believe this is the most efficient method for resolving this matter.

It is my understanding that the sole basis for your client's refusal to agree to dismiss this case is Tie Down's desire to recover its attorneys' fees under the Lanham Act. The enclosed Stipulation reserves Tie Down's right to seek its fees. However, it also reserves Kodiak's right to seek its fees in defense of Tie Down's claim under 28 U.S.C. § 1927 and Rule 11.

As you are aware, in order to recover fees, Tie Down will be required to show that this is an "exceptional case" by "clear and convincing evidence." *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 526 (5<sup>th</sup> Cir. 2002). In order to demonstrate an exceptional case in the Fifth Circuit, a defendant must show the case was brought in bad faith. *Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477, 490 (5<sup>th</sup> Cir. 2004). This is not an exceptional case.

The Court, while denying the preliminary injunction on the evidence presented at our abbreviated trial, did not see this as an implausible case. It took the Court two months to issue a 31-page opinion, with an extensive review of the facts. It relied on cases not cited by either

Mr. J. Alexander Porter  
January 21, 2005  
Page 2

party. Many of the factors it weighed supported Kodiak's claim. Most importantly, the Court found Tie Down intentionally copied Kodiak's design. *See Order Denying Motion for Preliminary Injunction* at 21. We have also engaged an expert who we think the Court will consider persuasive in defense of an attorney fee claim.

The proposed stipulation should satisfy. If your client insists in pursuing satellite litigation, please accept this letter of notice we will seek Kodiak's fees in defense of its claims.

Please contact me or Gary Kessler at your earliest convenience to discuss this offer.

Sincerely,



Bryon L. Romine

BLR/tbm  
Enclosure

cc: Kodiak Products Co., Inc.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

KODIAK PRODUCTS CO., INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:03-CV-1474-Y
	§	
TIE DOWN, INC.,	§	
	§	
Defendant.	§	

**STIPULATION OF DISMISSAL**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Plaintiff Kodiak Product Co., Inc. ("Kodiak") and Defendant Tie Down, Inc. ("Tie Down") (together the "Parties") and, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), file this, their Stipulation of Dismissal.

The Parties, by and through their respective counsel, stipulate to dismiss this action with prejudice, each party to bear its own costs.

Defendant, however, reserves its rights to pursue a claim for attorneys' fees pursuant to 15 U.S.C. §1117(a) after entry of the Order of Dismissal. Plaintiff reserves the right to seek fees pursuant to 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 11 incurred in defending Defendant's pursuit of attorneys' fees, if any.

Respectfully submitted,

KESSLER & COLLINS, P.C.

PORTER & ORRISON, LLP

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GARY S. KESSLER  
Texas Bar No. 11358200  
BRYON L. ROMINE  
Texas Bar No. 24029804

---

J. ALEXANDER PORTER  
Georgia Bar No. 384700

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3400 Peachtree Road, N.E.  
1135 Lenox Towers  
Atlanta, Georgia 30326  
(404) 233-2334  
(404) 231-5318 (Facsimile)

*ATTORNEYS FOR KODIAK  
PRODUCTS CO., INC.*

*ATTORNEY FOR TIE DOWN, INC.*

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of *Plaintiff's Motion for Preliminary Injunction* was served via certified mail, return receipt requested on the \_\_\_\_ day of January, 2005, on the following counsel of record:

J. Alexander Porter  
Porter & Orrison, LLP  
3400 Peachtree Rd. N.E.  
1135 Lenox Towers  
Atlanta, Georgia 30326

---

GARY S. KESSLER

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

KODIAK PRODUCTS CO., INC.,

Plaintiff,

v.

TIE DOWN, INC.,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§

Civil Action No. 4:03-CV-1474-Y

**AGREED ORDER ON STIPULATION TO DISMISS**

Before the Court is the Parties' Stipulation of Dismissal. The Court has reviewed it, and good cause appearing, it is **ORDERED** that:

- 1) This matter is dismissed with prejudice, each party to bear its own costs;
- 2) The Court retains jurisdiction of this matter for the purposes of any application by Defendant for an award of attorneys' fees under 15 U.S.C. § 1117(a) and Plaintiff's pursuit of fees under 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 11 in response to such application for fees.

Signed: \_\_\_\_\_

\_\_\_\_\_  
JUDGE PRESIDING

AGREED:

KESSLER & COLLINS, P.C.

PORTER & ORRISON, LLP

---

GARY S. KESSLER  
Texas Bar No. 11358200  
BRYON L. ROMINE  
Texas Bar No. 24029804

---

J. ALEXANDER PORTER  
Georgia Bar No. 384700

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(404) 233-2334  
(404) 231-5318 (Facsimile)

*ATTORNEYS FOR KODIAK  
PRODUCTS CO., INC.*

*ATTORNEYS FOR TIE DOWN, INC.*



IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

KODIAK PRODUCTS CO., INC.,	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 4:03-CV-1474-Y
v.	)	
	)	
TIE DOWN, INC.,	)	
	)	
Defendant.	)	

**STIPULATION OF DISMISSAL WITH PREJUDICE**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Plaintiff Kodiak Product Co., Inc. ("Kodiak") and Defendant Tie Down, Inc. ("Tie Down") (together the "Parties") and, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), file this, their Stipulation of Dismissal.

The Parties, by and through their respective counsel, stipulate to the dismissal with prejudice of Plaintiff's complaint, as amended.

Defendant, however, reserves its rights to pursue any claims which it may name for its attorneys fees and costs after entry of the Order of Dismissal. Plaintiff reserves the right to seek fees pursuant to 28 U.S.C. §1927 and Federal Rule of Civil Procedure 11 incurred in defending against any claim by Defendant for attorneys fees.

The parties further stipulate that any such motion by Defendant for attorneys' fees must be filed within 120 days of entry by the Court of an Agreed Order on Stipulation to Dismiss and that Defendant is entitled to discovery for a period of 90 days from filing of such order limited to the issue of its entitlement, if any, to attorneys fees and costs.

Respectfully submitted,

KESSLER & COLLINS, P.C.

PORTER & ORRISON, LLP

---

GARY S. KESSLER  
Texas Bar No. 11358200  
BYRON L. ROMINE  
Texas Bar No. 24029804

---

J. ALEXANDER PORTER  
Georgia Bar No. 584700

5950 Sherry Lane  
Suite 222  
Dallas, Texas 75225  
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3400 Peachtree Rd., N.E.  
Suite 1135, Lenox Towers  
Atlanta, Georgia 30326  
404/233-2334  
404/231-5318 (facsimile)

*ATTORNEYS FOR KODIAK  
PRODUCTS CO., INC.*

*ATTORNEYS FOR  
TIE DOWN, INC.*

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of *Stipulation for Dismissal with Prejudice* was served via certified mail, return receipt requested on the \_\_\_\_\_ day of January, 2005, on the following counsel of record:

J. Alexander Porter  
Porter & Orrison, LLP  
3400 Peachtree Rd., N.E.  
1135 Lenox Towers  
Atlanta, Georgia 30326

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GARY S. KESSLER

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

KODIAK PRODUCTS CO., INC.,	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 4:03-CV-1474-Y
v.	)	
	)	
TIE DOWN, INC.,	)	
	)	
Defendant.	)	

**AGREED ORDER ON STIPULATION OF DISMISSAL WITH PREJUDICE**

Before the Court is the Parties' Stipulation of Dismissal. The Court has reviewed it, and good cause appearing, it is **ORDERED** that:

- 1) Plaintiff's Complaint, as amended, is hereby dismissed with prejudice;
- 2) The Court retains jurisdiction of this matter for the purposes of any application by Defendant for an award of attorneys' fees and costs and Plaintiff's pursuit of fees under 28 U.S.C. §1927 and Federal Rule of Civil Procedure 11 in response to such application for fees. Any such application by Defendant must be filed within 120 days of the date of entry of this Order;
- 3) Defendant is granted a period of 90 days from entry of this order to make discovery, limited to the issue of entitlement, if any, to attorneys fees and costs.

DATED: \_\_\_\_\_.

\_\_\_\_\_  
JUDGE PRESIDING

The above and foregoing is hereby agreed to.

KESSLER & COLLINS, P.C.

PORTER & ORRISON, LLP

---

GARY S. KESSLER  
Texas Bar No. 11358200  
BYRON L. ROMINE  
Texas Bar No. 24029804

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J. ALEXANDER PORTER  
Georgia Bar No. 584700

5950 Sherry Lane  
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Atlanta, Georgia 30326  
404/233-2334  
404/231-5318 (facsimile)

*ATTORNEYS FOR KODIAK  
PRODUCTS CO., INC.*

*ATTORNEYS FOR  
TIE DOWN, INC.*

### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of a *Agreed Order on Stipulation for Dismissal with Prejudice* was served via certified mail, return receipt requested on the \_\_\_\_ day of January, 2005, on the following counsel of record:

J. Alexander Porter  
Porter & Orrison, LLP  
3400 Peachtree Rd., N.E.  
1135 Lenox Towers  
Atlanta, Georgia 30326

---

GARY S. KESSLER

**PORTER & ORRISON, LLP**  
ATTORNEYS AT LAW  
1135 LENOX TOWERS  
3400 PEACHTREE ROAD, N. E.  
ATLANTA, GEORGIA 30326  
404/233-2334

J. ALEXANDER PORTER

FACSIMILE 404/231-5318

January 27, 2005

**VIA FACSIMILE/AND**  
**FEDERAL EXPRESS**

Bryon Romine, Esq.  
Kessler & Collins, P.C.  
5950 Sherry Lane  
Suite 222  
Dallas, TX 75225

Re: Kodiak Products Co., Inc. v. Tie Down, Inc.,  
Civil Action No. 4-03CV1474-Y  
In the U.S. District Court for the Northern District  
of Texas, Forth Worth Division

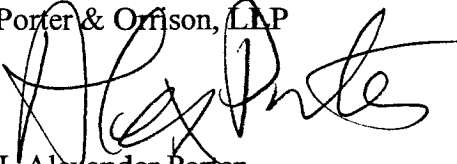
Dear Bryan:

I received your e-mail of today wherein you request that we schedule the "deposition" for February 9, 2005. As you know I have been trying to schedule two depositions. Enclosed herewith are deposition notices for the taking of depositions of Mr. Glidewell and Mr. Dolezal on February 9, 2005 at the offices of Ford, White, & Nassen, P.C. Of course, I am willing to take these depositions in your office, but we had not discussed that previously.

Best regards.

Very truly yours,

Porter & Orrison, LLP



J. Alexander Porter

JAP/ewh

cc: Charles J. MacKarvich

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

KODIAK PRODUCTS CO., INC.,	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 4:03-CV-1474-Y
v.	)	
	)	
TIE DOWN, INC.,	)	
	)	
Defendant.	)	

**NOTICE OF TAKING OF DEPOSITION**

To: Plaintiff Kodiak Products Co., Inc. by and through its counsel of record Bryon L. Romine, Kessler & Collins, 5950 Sherry Lane, Suite 222, Dallas Texas 75225

Please take notice that the Defendant Tie Down, Inc. in the above-styled action will take the deposition of William Glidewell , managing agent of Plaintiff, commencing at 9:00 am o'clock Central Time, on February 9, 2005, at the offices of FORD WHITE & NASSEN P.C. 8080 North Central Expressway Suite 1600, LB 65, Dallas, Texas 75206-1819

This deposition will be taken before an officer duly authorized to administer oaths, and shall continue from day to day until completion. Said deposition will be taken on oral examination pursuant to the Federal Rules of Civil Procedure and for all purposes of cross examination of an adverse party and for all other purposes authorized by those Rules and any other applicable rules. You are invited to attend.

Respectfully submitted,

PORTER & ORRISON, LLP



J. ALEXANDER PORTER  
Georgia Bar Number 584700  
Admitted Pro Hac Vice  
Lenox Towers Suite 1135  
3400 Peachtree Road, N.E.  
Atlanta, Georgia 30326  
Telephone: (404)233-2334  
Facsimile: (404)231-5318

Of Counsel:  
FORD WHITE & NASSEN P.C.  
DONALD F. HAWBAKER  
Texas Bar No. 09243300  
8080 North Central Expressway  
Suite 1600, LB 65  
Dallas, Texas 75206-1819  
Telephone: (214)523-5100  
Facsimile: (214)521-4601

ATTORNEYS FOR DEFENDANT  
TIE DOWN, INC.

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the above and foregoing documents has been served on the following counsel of record on this the 27<sup>th</sup> day of

Jan., 2005:

Gary S. Kessler, Esq.  
Bryon L. Romine  
Kessler & Collins  
5950 Sherry Lane, Suite 222  
Dallas, Texas 75225  
Facsimile: (214)373-4714

  
J. Alexander Porter

PORTER & ORRISON, LLP  
Lenox Towers Suite 1135  
3400 Peachtree Road, N.E.  
Atlanta, Georgia 30326  
Telephone: (404)233-2334  
Facsimile: (404)231-5318



IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

KODIAK PRODUCTS CO., INC.,

Plaintiff,

v.

TIE DOWN, INC.,

Defendant.

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)

Civil Action No. 4:03-CV-1474-Y

**NOTICE OF TAKING OF DEPOSITION**

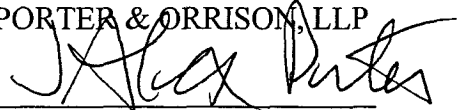
To: Plaintiff Kodiak Products Co., Inc. by and through its counsel of record Bryon L. Romine, Kessler & Collins, 5950 Sherry Lane, Suite 222, Dallas Texas 75225

Please take notice that the Defendant Tie Down, Inc. in the above-styled action will take the deposition of Jerry Dolezal , managing agent of Plaintiff, commencing at 1:00 pm o'clock Central Time, on February 9, 2005, at the offices of FORD WHITE & NASSEN P.C. 8080 North Central Expressway Suite 1600, LB 65, Dallas, Texas 75206-1819

This deposition will be taken before an officer duly authorized to administer oaths, and shall continue from day to day until completion. Said deposition will be taken on oral examination pursuant to the Federal Rules of Civil Procedure and for all purposes of cross examination of an adverse party and for all other purposes authorized by those Rules and any other applicable rules. You are invited to attend.

Respectfully submitted,

PORTER & ORRISON, LLP



J. ALEXANDER PORTER

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Of Counsel:

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Telephone: (214)523-5100

Facsimile: (214)521-4601

ATTORNEYS FOR DEFENDANT


TIE DOWN, INC.

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the above and foregoing documents has been served on the following counsel of record on this the 27<sup>th</sup> day of

July, 2005:

Gary S. Kessler, Esq.  
Bryon L. Romine  
Kessler & Collins  
5950 Sherry Lane, Suite 222  
Dallas, Texas 75225  
Facsimile: (214)373-4714

  
J. Alexander Porter

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Facsimile: (404)231-5318



January 27, 2005

**VIA EMAIL - aporter@porterorrison.com**

Mr. J. Alexander Porter  
PORTER & ORRISON, LLP  
3400 Peachtree Road, N.E.  
1135 Lenox Towers  
Atlanta, Georgia 30326

Re: *Kodiak Products Co., Inc. v. Tie Down, Inc.*; Civil Action No. 4-03CV1474-Y; Filed in the U.S. District Court, Northern District of Texas, Fort Worth Division

Dear Alex:

I have received your deposition notices for Mr. Glidewell and Mr. Dolezal. This appears to be another instance you are attempting to take a mile when given an inch. We have verbally agreed to produce Mr. Glidewell after the close of the discovery period, based upon the assumption his would be the only deposition taken. We have never agreed to produce Mr. Dolezal or agreed to a wholesale extension of the discovery deadline.

Please withdraw your Notice of Deposition for Mr. Dolezal or we will withdraw our consent to produce any witnesses. If you agree to withdraw Mr. Dolezal's notice, we will agree to produce Mr. Glidewell for deposition at our office subject to the conditions we discussed: 1) the scope of the deposition will be limited to factual issues concerning Kodiak's claims; 2) the deposition will be limited in time to a half a day (four (4) hours). If these conditions are acceptable, please sign in the space below for purposes of Federal Rule of Civil Procedure 29.

If you are unwilling to withdraw your notice or refuse to return a signed copy of this letter to my attention by facsimile by 5:00 pm CST tomorrow, accept this letter for certificate of conference purposes relating to our Motion for Protective Order.

Mr. J. Alexander Porter  
January 27, 2005  
Page 2

Sincerely,

A handwritten signature in black ink, appearing to read "Bryon 272".

Bryon L. Romine

BLR/tbm

AGREED:

---

J. Alexander Porter, attorney for Defendant Tie Down, Inc.

cc: Kodiak Products Co., Inc.

**PORTER & ORRISON, LLP**  
ATTORNEYS AT LAW  
1135 LENOX TOWERS  
3400 PEACHTREE ROAD, N. E.  
ATLANTA, GEORGIA 30326  
404/233-2334

J. ALEXANDER PORTER

FACSIMILE 404/231-5318

January 31, 2005

**VIA FACSIMILE/AND U.S. MAIL**

Bryon Romine, Esq.  
Kessler & Collins, P.C.  
5950 Sherry Lane  
Suite 222  
Dallas, TX 75225

Re: Kodiak Products Co., Inc. v. Tie Down, Inc.,  
Civil Action No. 4-03CV1474-Y  
In the U.S. District Court for the Northern District  
of Texas, Forth Worth Division

Dear Bryan:

I am in receipt of your letter of January 27, 2005, regarding the depositions which we desire to take.

First, let me say that we will not agree to your conditions.

I simply cannot understand why I am accused of "taking a mile when given an inch," either in this instance or otherwise in this case. But for consenting to a preliminary injunction, I have agreed to every request by you that has been made including two discovery extensions. My requests to take your client's depositions have not been unreasonable. You have successfully put them off at every turn.

On at least two occasions in just the recent past, Mr. Glidewell's deposition has been postponed at your firm's request. Most recently, Mr. Kessler stated that he would agree to the taking of Mr. Glidewell's deposition after January 28, 2005, the close of discovery. All of this came up in the context of trying to resolve the case. Mr. Kessler's latest proposal to Tie Down in essence was that Kodiak would agree to a stipulation dismissing the case, with prejudice upon an agreed order but that Tie Down would reserve the right to seek attorneys' fees and costs against Kodiak. I sent a counter-proposal agreeing in principal, but reserving limited discovery regarding the attorneys' fees issue. In our discussions surrounding these proposals, all of which took place last week, I told Mr. Kessler that since I had never taken discovery depositions of Kodiak,

EXHIBIT 6

VIA FACSIMILE/AND U.S. MAIL

Bryon Rominc, Esq.  
January 31, 2005  
Page Two

and since the discovery period was about to lapse, I wanted to be protected if the stipulation concept did not work. I told him that I wanted to take the deposition of Mr. Jerry Dolezal as well as that of Mr. Glidewell. I had told you that in the week prior and suggested January 27, 2005 for both witnesses. He agreed that I could take Mr. Glidewell's deposition beyond January 28, 2005. Your email to me of January 25, 2005, was apparently a revocation of Gary's promise. The next day, you questioned making Mr. Dolezal available. In the meantime, on January 26, 2005, you also advised me that Kodiak would not accept any stipulation that reserved discovery and that you were going to file a motion to dismiss the case.

Whereas you have finally agreed to make Mr. Glidewell available, you want to limit the time for his examination and the scope of the subject matter, conditions which your letter says were previously discussed, but were not. No such limitations were imposed when Mr. MacKarvich's deposition was taken. These conditions are simply not acceptable.

When this litigation commenced, Mr. MacKarvich advised Mr. Glidewell that the 46250 caliper was out of production and would no longer be sold when inventory was depleted because of Tie Down's introduction of the aluminum 46304. A non-machined cast of the 46304 was sent to Mr. Glidewell.

Instead of discussing the matter further, Kodiak amended its complaint to include the 46304 caliper and filed a motion for preliminary injunction regarding both calipers, seeking to shut down Tie Down's caliper business. As you know, Tie Down has spent approximately \$150,000 in defending this frivolous litigation which we advised months ago we felt was based on anticompetitive motives.

Best regards.

Sincerely,

PORTER & ORRISON, LLP

  
J. Alexander Porter

JAP/ewh

cc: Charles J. MacKarvich